Abdullah bin Abdul Rahman @ Abdul Halim v Continental Tyre AS Malaysia Sdn Bhd & Anor

HIGH COURT (ALOR SETAR) — CIVIL SUIT NO 25–28–11 OF 2015
CHAN JIT LI JC
16 MAY 2017

Labour Law — Industrial court — Dispute over wrongful dismissal — Applicant suffered injury at the workplace rendering him unfit for his job — Applicant medically boarded out — Claim for wrongful dismissal, reinstatement and back wages — Whether industrial court failed to consider the first respondent's alleged procedural errors to render dismissal wrongful — Whether industrial court correct in concluding that the contract of employment was frustrated

The applicant was in the employment of the first respondent as a leaderhand. The applicant later suffered an accident on 3 October 2012 while at work. As a result of this accident, the applicant suffered back pain and he was diagnosed as suffering from 'PID L5-S1 with spinal stenosis'. Because of this, the applicant was granted medical leave from 5 October 2012–30 April 2013. Before the medical leave was expired, the applicant was informed that he had been medically boarded out effective 21 November 2012. He was informed by the second respondent that the first respondent had corresponded with a Dr Suresh, the first respondent's panel doctor and the doctor who treated the applicant, where Dr Suresh was of the opinion that the applicant was no longer fit for his job which involved lifting 18–25kg jointless bend 20–25 times a day. The Industrial Court of Penang dismissed the applicants claim for wrongful dismissal, reinstatement and payment of back wages. The applicant applied before this court for an order of certiorari to quash the award of the industrial court claiming the decision was irrational, unlawful and was amenable to judicial review. The applicant also applied for an order for the first respondent to reinstate the applicant and for payment of back wages. The issues to be determined were: (a) whether the industrial court ('the second respondent') failed to consider the first respondent's alleged procedural errors to render the dismissal wrongful; and (b) whether the second respondent was correct in concluding that the contract of employment was frustrated.

Held, dismissing the application for judicial review with costs:

(1) There was nothing to show that the decision of the Industrial Court was not factually supported or was irrational. The judicial commissioner did not find that the second respondent had considered irrelevant matters and neglected to consider relevant matters. It was evident that the

industrial court did make the necessary observations that: (a) the medical evidence showed that the applicant was medically unfit to perform his duties; (b) the first respondent did attempt but failed to find an alternative job for the applicant; and (c) the applicant knew the reason for termination (see paras 25–26).

[Bahasa Malaysia summary

Pemohon adalah pekerja responden pertama sebagai 'leaderhand'. Pemohon kemudiannya mengalami kemalangan pada 3 Oktober 2012 sewaktu bekerja. Akibat kemalangan ini, pemohon mengalami sakit belakang dan dia didiagnosis mengalami 'PID L5-S1 with spinal stenosis'. Kerana ini, pemohon diberikan cuti sakit dari 5 Oktober 2012–30 April 2013. Sebelum cuti sakit tamat, pemohon diberitahu bahawa dia telah ditamatkan pekerjaan atas alasan perubatan berkuat kuasa 21 November 2012. Dia diberitahu oleh responden kedua bahawa responden pertama telah berutus surat dengan Dr Suresh, panel doktor responden pertama dan doktor yang merawat pemohon, di mana Dr Suresh berpendapat bahawa pemohon tidak lagi sesuai dengan pekerjaannya yang melibatkan dia untuk mengangkat bengkuk sendi tidak bersambung seberat 18–25kg sebanyak 20–25 kali sehari. Mahkamah Perusahaan Pulau Pinang menolak tuntutan pemohon untuk pemecatan salah, pelantikan semula pekerjaan dan bayaran gaji kebelakangan. Pemohon memohon di hadapan mahkamah ini untuk perintah menolak award mahkamah perusahaan dengan mendakwa keputusan adalah tidak rasional, salah di sisi undang-undang dan terbuka kepada semakan kehakiman. Pemohon juga memohon perintah untuk responden pertama melantik semula pemohon bekerja dan untuk bayaran gaji kebelakangan. Isu-isu untuk ditentukan adalah: (a) sama ada Mahkamah Perusahaan ('responden kedua') gagal untuk mempertimbangkan kesilapan prosedur responden pertama yang didakwa untuk menyebabkan pemecatan salah; dan (b) sama ada responden kedua betul dalam menyimpul bahawa kontrak pekerjaan adalah dikecewakan.

Diputuskan, menolak permohonan untuk semakan kehakiman dengan kos:

(1) Tidak terdapat apa-apa untuk menunjukkan bahawa keputusan Mahkamah Perusahaan tidak disokong dengan fakta atau tidak rasional. Pesuruhjaya kehakiman tidak mendapati bahawa responden kedua telah mempertimbangkan perkara-perkara tidak relevan dan cuai untuk mempertimbangkan perkara-perkara relevan. Ia adalah jelas bahawa Mahkamah Perusahaan telah membuat pemerhatian yang perlu bahawa: (a) keterangan perubatan menunjukkan bahawa pemohon tidak sesuai untuk menjalankan tugas-tugasnya secara perubatan; (b) responden pertama telah mencuba tetapi gagal untuk mendapatkan pekerjaan alternatif untuk pemohon; dan (c) pemohon mengetahui sebab untuk penamatan pekerjaan (lihat perenggan 25–26).]

Notes

For a case on dispute over wrongful dismissal, see 8(1) *Mallal's Digest* (5th Ed, 2017 Reissue) para 1840.

Cases referred to

Gopalakrishnan a/l Vasupillai v Goodyear Malaysia Berhad and Anor [2010] MLJU 651; [2010] 1 LNS 637, HC (refd)

Kempas Edible Oil Sdn Bhd v Prabdhial Singh Dardara Singh [2015] 7 CLJ 203, CA (refd)

Pauline Peck v Saratim Insurance Agency Services Sdn Bhd [2010] 3 ILR 630; [2013] 2 LNS 1815, IC (refd)

Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd [2010] 6 MLJ 1; [2010] 8 CLJ 639, FC (refd)

Tenaga Nasional Bhd v Yahaya bin Jusoh [2014] 1 MLJ 483; [2014] 2 CLJ 498, CA (consd)

Muhamad Shamsul Nizam bin Sohhimi (Burhan & Co) for the appellant.
Pravin Kaur Jessy (Jessy & Assoc) for the respondents.

Chan Jit Li JC:

[1] This is an application for a judicial review of an award made by the Industrial Court of Penang (Award 1032/2015) on 24 August 2015. In its award the learned Industrial Court Chairman had dismissed the applicant's claim before the Industrial Court for wrongful dismissal, for reinstatement, and for payment of backwages.

[2] Before this court the applicant applies for an order of certiorari to quash the award on the grounds that the decision of the Industrial Court was irrational and unlawful and hence amenable to judicial review; and an order for the first respondent Continental Tyre AS Malaysia Sdn Bhd to reinstate the applicant and to pay him backwages.

[3] The applicant had been in the employment of the first respondent since 1 June 1992. He was first appointed as an operator. However, in 2012 his services were terminated. At the time of the termination he held the post of a leaderhand. He had been holding this post since 2002.

[4] The Industrial Court at Penang, having heard the claim, concluded that the dismissal had been with just cause and excuse. The learned chairman then went on to dismiss the applicant's claim. This led to the institution of the present action.

[5] The undisputed facts are as follows. The applicant suffered an accident

on 3 October 2012 while at work. As a result of this accident, he suffered back pain for which he sought treatment at a private clinic called Klinik Bersatu, Kuala Kedah ('the first respondent's panel doctor'). He was then referred to one Dr Suresh Ramasamy ('Dr Suresh'), an orthopaedic surgeon at the Putra Medical Centre, Alor Setar. Dr Suresh is also the first respondent's panel doctor. He conducted a Medical Resonance Imaging ('MRI') and diagnosed the applicant as suffering from 'PID L5-S1 with spinal stenosis'. The applicant was then given medical leave from 5 October 2012–30 April 2013.

[6] On 21 November 2012, before his medical leave expired, the applicant received a call from the office of his employer. One En Helmi Fadzil ('En Helmi') requested for his presence at the Human Resource Department the following day. As per the request the applicant met the said En Helmi on 22 November 2012. En Helmi then took him to see the Human Resource Manager, one En V Guvendiran ('HR Manager').

[7] The applicant deposed that at the meeting with the HR Manager he was asked to sign some documents relating to 'Compensation for Long term Illness'. He was then informed that he had been medically boarded out with effect from 21 November 2012. It was also then that he was shown the correspondence between the first respondent and Dr Suresh. The first respondent's letter to Dr Suresh appears as follows:

> CONTINENTAL
>
> 1st Nov 2012
>
> Putra Medical centre (PMC),
>
> 888, Jalan Sekerat,
>
> Off Jalan Putra,
>
> 05100 Alor Setar, Kedah.
>
> (Attn: Dr Suresh)
>
> Dear Doctor,
>
> *MEDICAL STATUS OF ABDULLAH BIN ABDUL RAHMAN.*
>
> Please be informed that En Abdullah b Abdul Rahman, i/c No:710216-02-5239 who was seeking medical treatment at your hospital has been granted number of medical leaves for this year. Until to date he still on medical leave due to *backache.*
>
> For your information the said employee is working as Combi line Leading Hand at the Production department. His task includes lifting the Jointless Bend (JLB). These JLB weight about 18kgs to 25kgs and he needs to lift about 20-25 times per day.
>
> Taking into consideration of his health status, job task and safety reasons, we would appreciate if you could confirm whether the employee is fit for further employment.

Thank you.

Yours sincerely,

Continental Sime Tyre AS Sdn Bhd

...(sgd).....

V GUVENDIRAN

Human Resources Manager.

Dr Suresh's reply is as follows:

Putra Medical Centre (PMC),

888, Jalan Sekerat, Off Jalan Putra, 05100 Alor Setar,

Kedah Darul Aman, Malaysia.

8/11/2012

Our ref: 080004542

V GUVENDIRAN

Human Resources Manager.

Continental Alor Setar.

Dear Sirs,

Re: Medical Report for

Name: En. Abdullah b Abdul Rahman,

NRIC no: 710216-02-5239

Referring to your letter dated 1/11/2012 regarding the medical status of the abovenamed.

The above named has been diagnosed to have PID L5-S1 with spinal stenosis and has been on treatment. Looking at his job task which involves in lifting about 18kgs to 25kgs about 20-25 times per day would be a problem for his back and will aggravate his back pain. So he won't be able to do heavy manual task. That involves lifting/carrying heavy objects, thus he is not fit for current job.

Thank you.

Yours sincerely,

.....sgd.....

Dr Suresh Ramasamy

Consultant Orthopedic Surgeon.

[8] The applicant also deposed that he attempted to re-enter the first respondent's premises on two occasions, that is, on 26 and 23 November 2012

but was prevented from doing so. He lodged two police reports in respect of these incidents. These incidents are, however, not material to the application for judicial review today.

[9] It is the applicant's contention that he was medically boarded out by the first respondent and that, in the process, the first respondent committed legal errors which rendered his termination wrongful. Miss Pravin, learned counsel for the first respondent, however, contends that the applicant was not medically boarded out but that the applicant's contract of employment was frustrated by the applicant's medical condition which disabled him from performing his duties.

[10] In *Tenaga Nasional Bhd v Yahaya bin Jusoh* [2014] 1 MLJ 483; [2014] 2 CLJ 498, Tengku Maimun JCA, in delivering the decision of the Court of Appeal, explains the role of the High Court in hearing a judicial review application (at pp 488–489 (MLJ); p 505 (CLJ)):

> The role of a High Court in hearing a case of judicial review is highly limited and rules governing judicial review application differ from that of a normal appeal as a judicial review of the manner in which the decision was made. It is not the function of the High Court to review the evidence and substitute its own view of the decision maker and the High Court should not interfere with the decision of the Industrial Court unless there is a real error of law. There are limited exceptions though, where review may extend to substance of the decision and not just the decision making process ie where there is illegality, irrationality or impropriety.

[11] Bearing in mind the above principles, I shall now consider the following issues:

(a) whether the second respondent failed to consider the first respondent's alleged procedural errors so as to render the dismissal wrongful? and

(b) whether the Industrial Court was right in concluding that the contract of employment was frustrated?

WHETHER THE INDUSTRIAL COURT FAILED TO CONSIDER THE FIRST RESPONDENT'S ALLEGED PROCEDURAL ERRORS THAT RENDER THE DISMISSAL WRONGFUL?

[12] En Mohamad Shamsul Nizam ('En Shamsul'), learned counsel for the applicant, submits that the Industrial Court's decision was 'illegal' and irrational when it made the following findings:

> This court is of the considered view that since the claimant is unable to perform his duties any longer because of his injuries, this would amount to frustration. ... The respondent is entitled to consider the contract of employment was frustrated.

Therefore the respondent's action in terminating his services was with just cause and excuse. ...

[13] He argues that the first respondent through its HR Manager had erroneously relied on article 23 of the Collective Agreement executed between the first respondent and the Workers Union on 20 December 2014. This article provides as follows:

ARTIKEL 23: SAKIT BERPANJANGAN

Dalam kes-kes penyakit berpanjangan akibat dari batuk kering, barah, polio, leukimia, darah tinggi, kencing manis, buah pinggang dan lain-lain penyakit lain yang berlandaskan ramalan Doktor Syarikat, pekerja-pekerja yang telah disahkan jawatan akan diberi faedah penamatan mengikut peruntukan yang terdapat dalam Klausa 6 Peraturan-Peraturan Kerja (Faedah-Faedah Penamatan dan Hentikerja Sentara) 1980:

Kurang daripada dua (2) tahun perkhidmatan 10 hari/tahun

Dua (2) tahun stau lebih tetapi kurang daripada

lima (5) tahun perkhidmatan 15 hari/tahun

Lima (5) tahun perkhidmatan atau lebih 20 hari/tahun

Apabila Doktor Syarikat membuat pengesahan bahawa tiada harapan sembuh untuk penyakit berpanjangan sebagaimanan dimaksudkan di para (i), pekerja boleh ditawarkan oleh Syarikat di atas persetujuannya untuk layak mendapat kesemua faedah-faedah di atas sekali gus dan tambahan kepada lain-lain bayaran yang ianya layak.

[14] He contends that article 23 is the only provision that allows the first respondent to medically board an employee out. The provision of this article is restrictive in that termination is only possible if the employee suffers from either one of the mentioned sickness. The applicant's condition, however, does not fall within the ambit of article 23. Therefore, the first respondent erred in relying on this article. He further submits that there was insufficient medical evidence to support the first respondent's decision of medically boarding out the applicant. Firstly, the first respondent had relied solely on Dr Suresh's letter which I have alluded to earlier. Secondly, the termination was effected whilst the applicant was still recuperating.

[15] With respect, I am of the view that the issue raised by the applicant in respect of the inadequacy of an enquiry or the erroneous conduct by the first respondent in regard to his medical condition is a non-issue. It is trite that a hearing at the Industrial Court is a rehearing. And, as it is an impartial body the Industrial Court will be the best forum to redress any shortcomings in a domestic inquiry. This very issue was considered by the Court of Appeal in *Kempas Edible Oil Sdn Bhd v Prabdhial Singh Dardara Singh* [2015] 7 CLJ

203. Mohd Hishamudin Yunus JCA in delivering a wholesome judgment held (at pp 214–216):

On the failure to hold a domestic inquiry

[29] In our view, in the present case, we agree with the submission by the learned counsel for the appellant that the learned High Court Judge, with respect, in examining the procedural aspect of the decision making process adopted by the appellant (the employer) in arriving at the decision to terminate the employment of the respondent (employee) had departed from established principles of law as laid down in *Wong Yuen Hock v Syarikat Hong Leong Assurance Sdn Bhd & Another Appeal* [1995] 2 MLJ 753; [1995] 3 CLJ 344 and *Dreamland Corp (M) Sdn Bhd v Choong Chin Sooi & Industrial Court of Malaysia* [1988] 1 MLJ 34; [1988] 1 CLJ 1; [1988] 1 CLJ Rep 39.

[30] It is to be recalled that the jurisdiction of the Industrial Court is conferred by the Minister's reference under s 20 of the Industrial Relations Act 1967.

[31] Section 30(5) of the Industrial Relations Act 1967 provides that:

> (5) The Court shall act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form.

[32] The function of the Industrial Court when hearing such reference has been clearly explained by Raja Azlan Shah CJ (Malaya) (as he then was) in the Federal Court case of *Goon Kwee Phoy v J&P Coats (M) Bhd* [1981] 1 LNS 30; [1981] 2 Ch 149. In this case cited, the learned Chief Judge (Malaya) said (at p 136):

> Where representations are made and are referred to the Industrial Court for enquiry, it is the duty of that court to determine whether the termination or dismissal is with or without just cause or excuse. If the employer chooses to give a reason for the action taken by him, the duty of the Industrial Court will be to enquire whether that excuse or reason has or has not been made out. If it finds as a fact that it has not been proved, then the inevitable conclusion must be that the termination or dismissal was without just cause or excuse. The proper enquiry of the court is the reason advanced by it and that court or the High Court cannot go into another reason not relied on by the employer or find one for it.

[33] 14 years later *Goon Kwee Phoy* was cited with approval by the Federal Court in *Wong Yuen Hock v Syarikat Hong Leong Assurance Sdn Bhd & Another Appeal* [1995] 2 MLJ 753; [1995] 3 CLJ 344 . In this case cited, Mohd Azmi FCJ having quoted *Goon Kwee Phoy* said (at p 762):

> On the authorities, we were of the view that the main and only function of the Industrial Court in dealing with a reference under s 20 of the Act (unless otherwise lawfully provided by the terms of the reference), is to determine whether the misconduct or irregularities complained of by the management as the grounds of dismissal were in fact committed by the workman, and if so, whether such grounds constitute just cause or excuse for the dismissal.

[34] And subsequently in *Milan Auto Sdn Bhd v Wong Seh Yen* [1995] 3 MLJ 537; [1995] 4 CLJ 449 the Federal Court likewise held (at pp 542–543 (MLJ); p 455 (CLJ)):

> As pointed out by this Court recently in *Wong Yuen Hock v Syarikat Hong Leong Assurance Sdn Bhd & Another Appeal* [1995] 2 MLJ 753; [1995] 3 CLJ 344 , the function of the Industrial Court in dismissal cases on a reference under s 20 is two-fold, firstly, to determine whether the misconduct complained of by the employer has been established, and secondly whether the proven misconduct constitutes just cause or excuse for the dismissal. Failure to determine these issues on the merits would be a jurisdictional error which would merit interference by certiorari by the High Court. Further, the Industrial Court would be acting in excess of jurisdiction if it changed the scope of the reference by substituting its own reason, that is to say a reason not relied upon by the employer for the dismissal.

[35] In *Wong Yuen Hock* the brief facts were that it was an unwritten rule of the company (Hong Leong Assurance Sdn Bhd), an insurance company, that staff are prohibited from purchasing wrecks. Rumours were floating around that the claimant in that case, Wong Yuen Hock, who was the claims manager of the company at the material time, had purchased the wreck of a luxurious Mercedes Benz insured with the company without the knowledge of the company. The claimant was sacked without eliciting an explanation from him or affording him the right to be heard in a domestic inquiry, this being one of the terms and conditions of his contract of employment. On the issue regarding the failure on the part of the employer to hold a domestic inquiry, Mohd Azmi FCJ, at a later part of the judgment in *Wong Yuen Hock*, added (at p 767):

> It was not within the ambit of the reference for the Industrial Court to determine whether Hong Leong ought to be punished for failing to hold a domestic inquiry. The Industrial Court was not competent to declare the dismissal void for failure to comply with the rules of natural justice. The very purpose of the inquiry before the Industrial Court was to give both parties to the dispute an opportunity to be heard irrespective of whether there was a need for the employer to hold a contractual or statutory inquiry. We were confident that the Industrial Court as constituted at present was capable of arriving at a fair result by fair means on all matters referred to it. If therefore there had been a procedural breach of natural justice committed by the employer at the initial stage, there was no reason why it could not be cured at the re-hearing by the Industrial Court.

[36] Reverting to the present case, on the authorities, we hold that it was the statutory function of the Industrial Court to determine, firstly, whether the appellant was able to establish to the satisfaction of the Industrial Court the reason for the dismissal of the respondent; and, secondly, whether such reason constituted sufficient cause for the dismissal. The Industrial Court had no jurisdiction to vitiate or nullify the dismissal merely because there was failure on the part of the employer to notify the employee the nature of the alleged misconduct or to hold a domestic inquiry.

[37] In the present case, it is not disputed that the respondent at the time of the dismissal was not informed of the nature of the alleged misconduct. It is also not disputed that no domestic inquiry was held. But the respondent had brought his claim for wrongful dismissal to the Industrial Court. And the Industrial Court on its part, acting within the scope of its jurisdiction, had considered the evidence and the

A facts presented before it and had arrived at a finding that the appellant was able to establish a valid reason for the respondent's dismissal: that the respondent had over a span of time indulged in corrupt practices that involved Zulfakar and the appellant's business dealing with Zulfida Enterprise, as explained by the Industrial Court in its award.

B

[16] To my mind, the applicant not only could but should have ventilated his grouses regarding the first respondent's omissions at the Industrial Court. And, if, indeed, the applicant was fit to perform his duties, he should have adduced rebuttal evidence at the Industrial Court to disprove the first C respondent's contention that he was unfit. However, he chose not to and gave no reasons for his failure to do so.

[17] I also note that article 23 appearing at para 12 is not as restrictive as submitted by En Shamsul. After listing the various illnesses, there is a 'catch-all' D phrase appearing as 'lain-lain penyakit lain yang berlandaskan ramalan Doktor Syarikat'. It was therefore open to the first respondent to rely on this phrase. I am also minded to conclude that the true intent of this article is to enable the employer to calculate additional monetary benefits for an employee who is E medically boarded out. I do not think it was ever intended, as what En Shamsul submits, to merely specify the illness for which an employee may be medically boarded out.

WAS THE INDUSTRIAL COURT RIGHT IN CONCLUDING THAT THE CONTRACT OF EMPLOYMENT WAS FRUSTRATED?

F

[18] In reply to Miss Pravin's contention that the contract of service was frustrated because of the applicant's medical condition, En Shamsul submits that even if the contract was indeed frustrated, the first respondent's decision is still bad in law as it had failed to fulfil its duty of providing the applicant an G alternative job. He relies on a passage in a book by John McGlyne entitled *Unfair Dismissal Cases* which states as follows:

Sickness and Unfair Dismissal.

H If an employee is incapacitated by ill health and is no longer able to perform the job he was employed to do, his employer should consider whether or not the man could be kept in employment in another capacity. If there is an existing job even if it is the lower paid, the employer should offer alternative employment to the employee. If the employee refuses such other offers then it seems to be reasonable for the employer to dismiss the employee. It should be noted that the employer is only I required to consider the employee's ability to perform existing jobs — there is no duty on the employer to create a new job or to modify an existing one, in order to continue the employment

This passage was cited with approval in *Gopalakrishnan a/l Vasupillai v*

Goodyear Malaysia Berhad and Anor [2010] MLJU 651; [2010] 1 LNS 637.

[19] In *Gopalakrishnan*, the worker served the employer for 11 years before his services were terminated on medical grounds. Mohamad Arif Md Yusoff J (as he then was) held (at p 9 (LNS)):

> The common strand in these cases is the holding that the employer in medical boarding out cases is expected to act reasonably in accordance with its obligations of social consciousness, and should attempt to offer an alternative employment to the employee, even though it might be a lower paying job. And the employer is expected to listen not only to the Medical Board, but must also consider whatever evidence there are that might be favourable to the Plaintiff. Implicit in this, is the requirement that the employer, before it decides to act on the medical opinion, has also to properly listen to the employee. These principles that apply on top of the doctrine of frustration of the employment contract, if at all applicable on the particular facts of the case.

[20] En Shamsul's argument in a nutshell is that the Industrial Court erred for having failed to take into account that the first respondent did not take into account evidence favourable to the applicant and also failed to offer the applicant an alternative job. However, En Shamsul does not state what the 'favourable' evidence the Industrial Court has failed to take into consideration.

[21] The learned author Harvey on *Industrial Relations And Employment Law* (Butterworths Series) explains the doctrine of frustration in contracts of employment as follows:

> One instance of termination by operation of law is the doctrine of frustration: where, without the fault of either party, some supervening event occurs which was not reasonably foreseeable at the time when the contract was made and which renders further performance of the contract either totally impossible or something radically different from what the parties bargained for, then the contract is forthwith discharged by operation of law. Typical instances of frustration of the contract are (subject always to the terms of the contract, expressed or implied) death or serious illness or injury of an individual party to the contract, a change in the law, or war.

[22] The Industrial Court in *Pauline Peck v Saratim Insurance Agency Services Sdn Bhd* [2010] 3 ILR 630; [2013] 2 LNS 1815 (Award No 901 of 2010), in determining the issue of whether the contract of employment of a branch manager was frustrated for medical reasons, held:

> One of the ways by which a contract of employment may come to an end apart from the dismissal of an employee is by the application of the doctrine of frustration. By frustration, it means that there has been such a change of circumstances that events make it physically impossible for a contract to how performed as for example, where the illness of the employee lasts or is likely to last for a prolonged period. It cannot

A be disputed that illness or incapacity which is permanent will frustrate the contract, and so will illness which is of so prolonged a nature to prevent the employer from getting substantially what he has bargained for as it is also accepted that an employee must provide satisfactory performance of the work which he has contracted to do. (*Kumpulan Guthrie Sdn Bhd v KP Sukumari Amana Narayanan Meon,* Award B No 33 of 1973) ... The employers cannot be expected to go to unreasonable lengths in seeking to accommodate someone who is not able to carry out his job to the full extent (*Garricks (Caterers) Ltd v Nolan* [1980] 1 IRLR 259).

C **[23]** The learned author, CP Mills, in *Industrial Disputes Law in Malaysia* (2nd Ed, 1984) provides guidance in determining whether a contract of employment is frustrated (at p 99):

D In *Kumpulan Guthries Sdn Bhd v Sukumari* (Award No 33 of 73, 29 August 1973), a case where the workman had challenged his retirement on medical grounds, the court, in deciding whether the state of a workman's health provided just cause or excuse for his dismissal, applied the common law test of frustration, viz, whether the illness was such as totally to incapacitate the workman from rendering satisfactory service or materially to interfere with the proper performance of this contract of employment.

E **[24]** I will now have to enquire whether or not the Industrial Court did apply these principles in coming to its decision. The findings of facts by the Industrial Court in the case before me is as follows (at p 9):

F Based on the Claimant's nature of job, that he was required to lift the Jointless bend weighing 18kgs to 25kgs about 20 to 25 times a day, Mr Suresh concluded that he is not fit for his current job. The respondent tried to find the claimant an alternative job but there was no suitable position for his qualification. Hence the management was held with no other alternative but to medically board the claimant out in accordance with article 23 of the Collective Agreement.

G The basic question which this Court has to determine is whether in all circumstances the employer can be expected to wait any longer and if so, how much longer (see *Spenser v Paragon Wall Papers Ltd* [1977] ICR 301).

In the case of *Kumpulan Guthrie Sendirian Berhad v Madam KP Sukumari Amma d/o Narayan Menom* Award No 6 of 1973 had decided that illness of an employee H may operate to determining the contract if the illness is in such a way as to interfered materially with the proper performance of the contract. This court is of the considered view that since the respondent was incorporated to make business with a view of making profit, the claimant's disability had become a liability rather than asset to the respondent. There was no possible reason for the respondent to wait any longer as the claimant was certified not fit for his job. I

The fact that the respondent had not convened the medical board is not fatal as long as he was duly informed of the medical opinion by the doctor and was duly consulted by the respondent before he was made boarded out on medical ground.

The court finds that the respondent being aware of the serious nature of the

claimant's injury and the claimant's health status and safety in executing his duties therefore the respondent had acted in the best interest of both the claimant and the respondent on its action to terminate the claimant's employment on medical ground. This court is of the considered views that since the claimant is unable to perform his duties any longer because of his injuries this amount to frustration.

[25] It is evident that the Industrial Court, before concluding that the contract was frustrated due to the applicant's inability to perform his duties, did make the necessary observations, that is to say, that the medical evidence showed that the applicant was medically unfit to perform his duties (and that the applicant made no attempts to show otherwise), that the first respondent did attempt but failed to find an alternative job for the applicant, and that the applicant knew of the reason for the termination. The HR Manager in his testimony had said:

The consultant Orthopadic Surgeon, Mr Suresh ramasamy, under whose treatment caliman was, stated that, lifting weights would be a problem for claimant's back. This would aggravate the back pain, 'thus he is not fit for his current job'. The management after considering that we do not have alternative job based on his experience and qualification, decided to medically board claimant out based in the professional opinion by paying him for his years of service as per the collective agreement.

[26] Having read the findings of the Industrial Court, it is my finding that there is nothing to show that the decision of the Industrial Court was not factually supported or it was irrational. Neither could I find that the second respondent had considered irrelevant matters and had failed to consider relevant matters (see *Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd* [2010] 6 MLJ 1; [2010] 8 CLJ 639). Accordingly, the application for judicial review is dismissed with costs.

Application for judicial review dismissed with costs.

Reported by Fatin Mohd Ismail